IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.480 OF 2007

Francis G. Kinny ...Appellant

vs.

Municipal Corporation of
Greater Mumbai ...Respondent

Mr.A.M.Saraogi for the Appellant
Ms Geeta Joglekar for Respondent-Corporation.

CORAM: A.S.OKA,J.
DATE : JUNE 22, 2007.

P.C.:

1. Admit. The Advocate for the respondent waives service. Considering the facts and circumstances of the case, the Appeal is forthwith taken up for final hearing.

2. By the impugned order, the learned Trial Judge has dismissed the Notice of Motion flied by the Appellant-Plaintiff for temporary injunction. My attention is invited to paragraph 10 of the impugned order in which it was observed that suit structure was demolished on 22nd June 2005 and the said fact has not been controverted by the Appellant-Plaintiff. The learned Trial Judge has referred to the report of demolition submitted by the Assistant Commissioner of G/South Ward coupled with photographs. The learned Trial Judge has observed that the fact of demolition was suppressed by the Appellant-Plaintiff.

3. The submission of the learned Advocate for the Appellant is that the documents allegedly showing the demolition which are referred to paragraph 10 of the impugned order were never produced earlier and the same were shown to the learned Trial Judge at the time of hearing of oral submissions. He submitted that therefore the Appellant did not get an opportunity to deal with the said documents. The learned Advocate for the Respondent produced for my perusal a file containing the action papers. While perusing the file, I found that ad-interim order was passed by the Trial court on 30th June 2005 in favour of the Appellant. The said order has been passed after hearing and in presence of the Advocate for the Respondent. Surprisingly, at that time the Respondent-Corporation has not taken a stand that the structure was already demolished on 22nd June 2005. That is the reason why the learned Trial Judge granted ad-interim relief in favour of the appellant-Plaintiff which operated till the disposal of the Notice of Motion.

4. It is not in dispute that the documents showing the demolition allegedly carried out on 22nd June 2005 were produced across the bar at the time when the Notice of Motion was being heard. The said documents were not produced earlier and were not annexed to the reply filed by the Appellant. Considering the fact that on 30th June 2005, such a stand was not taken by the respondent, an opportunity deserves to be

granted to the Appellant to deal with the said documents which are referred to paragraph 10 of the impugned order. The contention of the Appellant is that no such demolition was carried out. As the impugned order is based only on the stand taken by the Respondent-Corporation regarding demolition which had allegedly taken place on 22nd June 2005, the impugned order deserves to be quashed and set aside with a direction to the Trial Court to hear the Notice of Motion afresh.

5. Hence I pass the following order :

i) Impugned Judgment and Order dated 20th January 2007 is quashed and set aside and the Notice of Motion No.2486 of 2005 is restored to the file.

ii) The Respondent-Corporation will supply copies of documents referred to in paragraph 10 of the impugned order to the Advocate on record for the Appellant in the Trial Court order within a period of four weeks from today. It will be open for the parties to file further Affidavits on the basis of the said documents.

iii) The learned Trial Judge will dispose of the Notice of Motion afresh as expeditiously as possible and preferably on or before 31st August 2007.

iv) It is made clear that till disposal of the Notice of Motion, both the parties will maintain status quo as of today in all respects in respect of the suit structure.

v) It will be open for the Respondent to take photographs of the suit structure and to place the same on record of the Trial Court.

vi) All contentions of the parties on merits of the pending Notice of Motion are expressly kept open.

vii) Appeal is partly allowed in above terms.

JUDGE